PART III

PROCEDURAL ISSUES

F. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

The Department of Labor's regulations pertaining to the adjudication and payment of duplicate claims are set forth at 20 C.F.R. §§725.309(c), (d), and 727.103(c). The Board has held that the regulations provide for the merger of subsequent claims with the first earlier claim filed with the Department of Labor such that all subsequent claims merge into the first claim filed with the Department of Labor, with the effect that the later claim loses its procedural identity. In order for a subsequent claim to be merged with a prior claim pursuant to Section 725.309(c), the prior claim must still be subject to Part 727 review (*i.e.*, a claim that has not been finally denied under Part 727). *See* ***Spese v. Peabody Coal Co.***, 11 BLR 1-174, 1-177 (1988), *dismissed with prejudice*, No, 88-3309 (7th Cir. Feb. 6, 1989)(unpub.). The general rule is that duplicate claims filed under Part C of the Act merge with:

1. previous claims, pending or denied, that were filed under Part B of the Act, and in which claimant has elected review under Section 435 of the Act, *see* 20 C.F.R. §725.309(c);

2. previous claims, pending or denied, that were filed under Part C of the Act before March 1, 1978, and that are subject to automatic review under Section 435 of the Act, *see* 20 C.F.R. §725.309(c); and

3. previous claims filed under Part C of the Act after March 1, 1978, only if the previous claim is not finally denied, *i.e.*, less than one year has elapsed since the most recent administrative denial, *see* 20 C.F.R. §725.309(d).

Chadwick v. Island Creek Coal Co., 7 BLR 1-883, 1-893 (1985), *aff'd on recon.*, 8 BLR 1-447 (1986)(en banc); ***Bates v. Director, OWCP***, 7 BLR 1-113 (1984); *see also* ***Lawley v. United States Steel Corp.***, 11 BLR 1-14 (1985)(for analysis of merger between two Part C claims). The Seventh Circuit has rejected the Board's merger analysis, as stated in ***Chadwick***. ***Old Ben Coal Co. v. Luker***, 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987).

With regard to merger involving a Part B claim, the Board has held that the date that claimant elected review of his denied Part B claim under the Reform Act would be

deemed the new filing date of that claim. 30 U.S.C. §945(a)(4); ***Chadwick***, ***supra***. If claimant had also filed a Section 415, 30 U.S.C. §925, transition period claim, *see* ***Bates***, ***supra***, or a pre-Reform Act Part C claim, *see Chadwick*, *supra*, the reviewed Part B claim merges into the earliest claim filed with the Department of Labor. This surviving post-merger claim becomes the reference point for the determination of the date of entitlement to benefits, the transfer of liability, and the prevention of duplicate payments.

Where two (or more) Part C claims merge, the operative date of filing is that of the initial Part C claim. ***Tackett v. Howell and Bailey Coal Co.***, 9 BLR 1-181 (1986); ***Lawley v. United States Steel Corp.***, 11 BLR 1-14 (1985); *see also* 20 C.F.R. §727.103(c). This date determines which substantive regulations apply, and is also relevant to determining the date that benefits commence, *see* 20 C.F.R. §725.503.

The merger regulations apply only when more than one claim has been filed by the same party. Thus, a miner's claim cannot be merged with a survivor's claim. ***The Earl Patton Coal Co. v. Patton***, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988), *aff'g*, 9 BLR 1-164 (1986); ***Johnson v. Eastern Associated Coal Corp.***, 8 BLR 1-248 (1985).

In ***Lukman v. Director, OWCP***, the Board initially addressed the Section 725.309(c), (d) requirement that claimants filing duplicate claims more than one year after the final denial of a previous claim under the Reform Act demonstrate a material change in conditions. In an en banc reconsideration of ***Lukman***, the Board discussed this regulatory requirement further, holding that, under the provisions of 20 C.F.R. §725.309(c), (d), claimant must demonstrate a material change in conditions with the duplicate claim application and any supporting medical evidence submitted therewith. The Board held that the district director must make a threshold determination as to whether the duplicate claim demonstrated a material change in conditions, and deny the duplicate claim on the basis of the denial of the initial claim if s/he found that the duplicate claim did not demonstrate this material change. If the district director, on the other hand, found a material change demonstrated, claimant had established a new and distinct claim and was afforded the administrative process to establish the separate issue of entitlement. ***Lukman v. Director, OWCP***, 11 BLR 1-71 (1988)(*en banc recon*.) (Brown and McGranery, JJ., concurring and dissenting).

In this decision on reconsideration, the majority of the Board (Ramsey, C.J., Smith and Dolder, JJ.) additionally held that jurisdiction of an appeal from the denial of a duplicate claim by the district director on the basis that no material change in conditions was demonstrated, lay directly with the Board, which was empowered to engage in a substantial evidence review thereof. The concurring and dissenting opinions of Judges Brown and McGranery agreed with the majority as to the construction of Section 725.309 but would have held that appeals from the district director's findings thereunder would lie with the Office of the Administrative Law Judges.

The Board's ***Lukman*** decision was reversed by the Tenth Circuit, which disagreed with the majority's holding regarding direct appeal to the Board of the district director's findings under Section 725.309. ***Lukman v. Director, OWCP***, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). The Tenth Circuit's approach in ***Lukman***, has now been adopted by the Board. The Court ruled in ***Lukman***, that "[t]he sole purpose of Section 725.309(d) was to provide relief from the ordinary principles of finality and *res judicata* to miners whose physical condition deteriorates" so as " ... to permit new claims to be filed even where modification under Section 725.310(a) was no longer available because more than a year had passed since the first claim was denied." ***Lukman***, 896 F.2d 1249, 1250, 13 BLR 2-335, 2-336. The court, thereafter, determined that all claims, whether the initial claim or a subsequent (duplicate) claim, must be processed essentially the same and must be adjudicated on the traditional three-tier system. The court specifically held that the district director must determine simultaneously whether: (1) there has been a material change in conditions, and (2) whether the claimant is entitled to benefits. After such determinations by the district director, a claimant is entitled to a hearing before an administrative law judge to examine both issues *de novo*. Finally, review on the merits of the administrative law judge's decision by the Board and the appropriate court of appeals is to be made available, 896 F.2d at 1254, 13 BLR at 2-345.

In deciding to follow the three-tier approach in the Tenth Circuit's holding in ***Lukman***, ***supra***, the Board held, therefore, that "[A]ny party dissatisfied with a District Director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges." ***Dotson v. Director, OWCP***, 14 BLR 1-10 (1990)(en banc order); *see also* ***Hall v. Director, OWCP***, 14 BLR 1-51 (1990)(en banc). Following issuance of ***Dotson***, ***supra***, the Board issued ***Rice v. Sahara Coal Co., Inc.***, 15 BLR 1-19 (1990)(en banc), in which the applicability of the ***Spese*** standard for determining whether a material change in conditions had been demonstrated was reiterated.

A "material change in conditions" is defined as relevant and probative evidence that demonstrates that there is a reasonable possibility that it would change the prior administrative result. ***Rice v. Sahara Coal Co., Inc.***, 15 BLR 1-19 (1990)(en banc); ***Spese v. Peabody Coal Co.***, 11 BLR 1-174, 1-176 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb 6, 1989)(unpub.). Where a "material change in conditions" is established, the subsequent claim is then considered a new and viable claim, and the filing date of the subsequent claim determines which substantive regulations apply. ***Spese***, ***supra***.

In a case arising in the Seventh Circuit, the Board deemed the administrative law judge's failure to apply ***Sahara Coal Co. v. Director, OWCP [McNew]***, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) in making his finding pursuant to Section 725.309(c) harmless error, because his ultimate finding satisfies the ***McNew*** standard, *i.e.*, the miner's first claim was denied because neither the existence of pneumoconiosis nor

total respiratory disability were established and the administrative law judge now finds the miner totally disabled due to pneumoconiosis. In order to maintain as much consistency as possible in its decisions, the Board will continue to apply the material change standard first articulated in the initial decision in this case, ***Spese v. Peabody Coal Co.***, 11 BLR 1-174 (1988), and reaffirmed in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), in cases arising outside the jurisdiction of the Seventh Circuit, *see* ***McNew***, ***supra***, and, in view of ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), in the Sixth Circuit. ***Spese v. Peabody Coal Co.***, 19 BLR 1-45 (1995).

In cases arising in circuits in which the United States Courts of Appeals have not yet addressed the standard applicable to a duplicate claim pursuant to 20 C.F.R. §725.309, the Board overruled its previous holding in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), and adopted the Director's position in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. ***Allen v. Mead Corp.***, 22 BLR 1-61 (2000).

CASE LISTINGS

[fact-finder erred finding claimant's Part B and Part C claims could be "treated as one" to merge supporting transfer of liability where claimant failed to file an election card or otherwise seek review] ***Warholic v. Barnes and Tucker***, 8 BLR 1-281 (1985)[applying rationale of ***Chadwick v. Island Creek Coal Co.***, 7 BLR 883 (1985)].

DIGESTS

Where claimant's February 1983 claim represented his first filing after the November 1981 denial of his April 1981 claim, 20 C.F.R. §725.309(c) requires that the February 1983 claim must be denied, unless the district director determined that there was a material change in conditions or that the requirements for requesting modification under 20 C.F.R. §725.310 were met. ***Eccher v. Director, OWCP***, 10 BLR 1-1 (1987).

If more than one survivor's claim has been filed, Section 725.309(c) provides that if the earlier claim is denied, the subsequent claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a motion for modification satisfying the requirements of Section 725.310. ***Clark v. Director, OWCP***, 9 BLR 1-205 (1986), *rev'd on other grounds*, ***Clark v. Director, OWCP***, 838 F.2d 2197, 11 BLR 2-46

(6th Cir. 1988).

In a case arising within the Seventh Circuit, and in which claimant received no election card and where good cause existed to excuse claimant's failure to timely file such election card in order to elect review under the Reform Act pursuant to Section 410.704(d), the Board held that transfer of liability to the Trust Fund was proper under either the rationale in ***Chadwick***, or the Court's holding in ***Luker***. ***Robertson v. Peabody Coal Co.***, 11 BLR 1-120 (1988).

For a subsequent claim to be merged with a prior claim pursuant to Section 725.309(c) the prior claim must still be subject to Part 727 review (*i.e.*, a claim which has not been finally denied under Part 727). Where, as here, the first claim had been reviewed under Part 727 and finally denied under Part 727, the claim was no longer subject to Part 727 review, and merger was improper. ***Spese v. Peabody Coal Co.***, 11 BLR 1-174, 1-177 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.).

Where the record contains two *survivors' claims* filed by the same claimant, and the previous claim has been denied, the subsequent claim must be denied on the basis of the earlier claim *unless* the subsequent claim is filed within one year of the last denial of the earlier claim. Thus, the "material change in conditions" language of Section 725.309 is *not* applicable to duplicate survivors' claims; duplicate survivors' claims may *only* be considered if the subsequent claim satisfies Section 725.310, *i.e.*, the duplicate claim is filed within one year of the previous denial, thus constituting a request for modification. ***Mack v. Matoaka Kitchekan Fuel***, 12 BLR 1-197 (1989); *but see* ***Jordan v. Director, OWCP***, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989)[Sixth Circuit declined to affirm the Board's application of the ***Clark***, ***Mack*** principle in a case in which the Director had not relied on the duplicate claims provisions to challenge the survivor's claim below].

The Board confirmed that the Sixth Circuit in ***Clark v. Director, OWCP***, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988) had not overruled the Board's holding in ***Clark v. Director, OWCP***, 9 BLR 1-205 (1986), that survivors are barred from filing duplicate claims beyond one year provided for modification by Section 725.309(d). ***Mack v. Matoaka Kitchekan Fuel***, 12 BLR 1-197 (1989).

Citing ***Spese v. Peabody Coal Co.***, 11 BLR 1-178 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.), the Eighth Circuit held that merger is available only when a previously denied claim, reopened for review under Part 727, and a subsequent claim are pending at the same time. Once a claim reviewed under Part 727 has been finally denied, even due to abandonment, *see* 20 C.F.R. §727.102(b)(5), it cannot be revived merely by filing a subsequent claim. ***Tonelli v. Director, OWCP***, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); *see also* ***West v. Director, OWCP***, 896 F.2d 308, 13 BLR 2-323 (8th Cir. 1990).

Where claimant initially filed a Part C claim and later filed a duplicate claim, the Board held that the statute of limitations provided by Section 422(f) of the Act, 30 U.S.C. §932(f), and implemented by 20 C.F.R. §725.308, applies to only the filing of claimant's initial Part C claim, therefore, the filing of any subsequent claim need not comply with the statute of limitations. The Board noted that its holding satisfied the purpose of the statute of limitations by ensuring that employer is provided notice of the current claim and of potential liability for future claims, in view of the progressive nature of pneumoconiosis. ***Faulk v. Peabody Coal Co.***, 14 BLR 1-18 (1990); ***Andryka v. Rochester & Pittsburgh Coal Co.***, 14 BLR 1-34 (1990).

After finding that the administrative law judge had jurisdiction for a *de novo* hearing pursuant to ***Dotson v. Director, OWCP***, 14 BLR 1-110 (1990)(en banc order), the Board affirmed as consistent with ***Spese v. Peabody Coal Co.***, 11 BLR 1-174 (1988), *dismissed with prejudice*, No, 88-3309 (7th Cir. Feb. 6, 1989)(unpublished), the administrative law judge's finding that a material change in conditions was established because the record contained evidence which was developed subsequent to the denial of the first claim, which could possibly, if fully credited, change the prior administrative result. ***Rice v. Sahara Coal Co., Inc.***, 15 BLR 1-19 (1990)(*en banc*).

The Board reaffirms the standard enunciated in ***Spese v. Peabody Coal Co.***, 11 BLR 1-174 (1988), *dismissed with prejudice*, No, 88-3309 (7th Cir. Feb. 6, 1989) (unpublished), for determining a material change in conditions in duplicate claims. The administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. When considering a duplicate claim on the merits, the administrative law judge must consider and weigh the evidence filed with both the prior claim and the new claim. The Board will apply this standard in all circuits except the Seventh. In the Seventh Circuit, the Board will apply the standard set forth by the United States Court of Appeals for the Seventh in ***Sahara Coal Co. v. Director, OWCP [McNew]***, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992).

The Board held that the doctrine of *res judicata* generally has no application in the context of a duplicate claim, as the purpose of 20 C.F.R. §725.309(d) is to provide relief from the principles of *res judicata* to a miner whose condition worsens over time. *See* ***Lukman v. Director, OWCP***, 896 F.2d 1248, 1253, 13 BLR 2-332, 2-344 (10th Cir. 1990). ***Sellards v. Director, OWCP***, 17 BLR 1-77 (1993).

Citing 20 C.F.R. §725.309(d), the Board reversed the award of benefits with respect to a duplicate survivor's claim on the ground that the second survivor's claim was filed more

than one year after the denial of the initial claim and, therefore, did not meet the timeliness requirement of 20 C.F.R. §725.310. The Board declined to accept claimant's assertion that the United States Court of Appeals for the Sixth Circuit has rejected the application of 20 C.F.R. §725.309(d) to bar duplicate survivor's claims when the requirements of 20 C.F.R. §725.310 are not met. The Board held that the Sixth Circuit's decisions in this area merely indicate that Section 725.309(d) cannot be applied to bar a duplicate survivor's claim when the party opposing entitlement has either waived reliance on Section 725.309(d) or failed to raise it any stage in the proceedings. *See* ***Jordan v. Director, OWCP***, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989); ***Clark v. Director, OWCP***, 838 F.2d 197, 200, 11 BLR 2-46, 2-50-51 (6th Cir. 1988). In the case at bar, employer/carrier placed claimant on notice that Section 725.309, was at issue when the claim was pending before the district director and throughout the administrative process. Thus, Section 725.309 could be applied to bar the duplicate survivor's claim. ***Watts v. Peabody Coal Co.***, 17 BLR 1-68 (1992).

In this case arising in the Seventh Circuit, the Board deemed the administrative law judge's failure to apply ***Sahara Coal Co. v. Director, OWCP [McNew]***, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) in making his finding pursuant to Section 725.309(c) harmless error, because his ultimate finding satisfies the ***McNew*** standard, *i.e.*, the miner's first claim was denied because neither the existence of pneumoconiosis nor total respiratory disability were established and the administrative law judge now finds the miner totally disabled due to pneumoconiosis. In order to maintain as much consistency as possible in its decisions, the Board will continue to apply the material change standard first articulated in the initial decision in this case, ***Spese v. Peabody Coal Co.***, 11 BLR 1-174 (1988), and reaffirmed in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), in cases arising outside the jurisdiction of the Seventh Circuit, *see* ***McNew***, ***supra***, and, in view of ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), in the Sixth Circuit. ***Spese v. Peabody Coal Co.***, 19 BLR 1-45 (1995).

Subsequent to the issuance of the administrative law judge's Decision and Order Upon Remand in this case, the Fourth Circuit adopted a standard with respect to 20 C.F.R. §725.309 that requires a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it or that the miner's disease has progressed to the point of total disability although it was not totally disabling at the time of the miner's first application. However, the Fourth Circuit has granted a motion for en banc reconsideration of its decision, which in effect has vacated the previous panel judgment and opinion. *See* ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (November 16, 1995). Accordingly, the Board declined to disturb its previous holding affirming the administrative law judge's determination that the record contains newly submitted evidence that establishes a material change in conditions under Section 725.309(d) in accordance with the standard set forth in ***Shupink v. LTV Steel Corp.***, 17 BLR 1-24 (1992). ***Church v. Eastern Associated Coal Corp.***, 20 BLR 1-8 (1996).

In response to employer's Motion for Reconsideration and in light of the *en banc* decision of the United States Court of Appeals for the Fourth Circuit in ***Lisa Lee Coal Mines v. Director, OWCP***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the Board altered its holding affirming the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309. The Board remanded the case to the administrative law judge solely for reconsideration of the duplicate claims issue pursuant to the standard adopted by the Fourth Circuit in its *en banc* decision in ***Rutter***. *Id*. **Church v. Eastern Associated Coal Corp.**, 21 BLR 1-51 (1997), *modifying on recon.*, 20 BLR 1-8 (1996).

In its Decision and Order on Reconsideration the Board held that a determination that the miner's physical condition has worsened is a requisite part of the duplicate claims analysis at 20 C.F.R. §725.309(d) under ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), and as such shall be applied to all cases arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. As the Board was unable to discern from the record whether the administrative law judge merely disagreed with the previous characterization of the evidence or whether claimant demonstrated a material change in condition since the earlier denial, the Board vacated its holding that claimant established a material change in conditions as a matter of law and remanded this case to the administrative law judge for consideration of the relevant evidence under the standard enunciated in ***Ross***. In light of the administrative law judge's prior determination that Dr. Fritzhand's 1984 opinion established a totally disabling respiratory impairment, the administrative law judge, on remand, must explain whether he merely disagreed with the previous characterization of Dr. Fritzhand's 1980 medical report or whether claimant has shown, through the submission of Dr. Fritzhand's 1984 medical opinion, that a material change in condition occurred since the earlier denial. ***Flynn v. Grundy Mining Co.***, 21 BLR 1-40 (1997).

With respect to the admission of evidence regarding the threshold determination of a material change in conditions in a duplicate claim pursuant to 20 C.F.R. §725.309, the Board held that the administrative law judge properly declined to consider any evidence that was in existence at the time of the first claim, and was not admitted into evidence until the time of the duplicate claim, on the grounds that such evidence "is not applicable in determining whether there has been a change in conditions since the denial," *see* ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). The Board held, however, that if on remand, the administrative law judge finds that claimant has established the threshold requirement of a material change in conditions pursuant to Section 725.309 in accordance with the standard in ***Rutter***, he should consider the entirety of the evidentiary record including that evidence that was in existence at the time of the first claim and was not admitted into evidence until the pendency of the second claim. ***Cline v. Westmoreland Coal Co.***, 21 BLR 1-69 (1997).

The Board held that the administrative law judge erred in determining that claimant's 1996 submission of new evidence constituted a duplicate claim. The Board further held that the filing of an untimely motion for modification does not constitute a new claim. The Board recognized that the regulations provide that the filing of a signed statement indicating an intention to claim benefits may be considered to be the filing of a claim under certain circumstances. 20 C.F.R. §725.305. Upon receiving such a written statement, the DOL is required to notify the signer, in writing, that to be considered, the claim must be executed by the claimant on a prescribed form and filed with the DOL within six months of the mailing of the notice. 20 C.F.R. §725.305(b). Although the DOL provided claimant with such notification, there was no indication that claimant filed the prescribed form. The regulations provide that claims based upon written statements indicating an intention to claim benefits that are not perfected by filing the prescribed form "shall not be processed." 20 C.F.R. §725.305(d). The Board, therefore, held that there was no claim before the administrative law judge to adjudicate. ***Stacy v. Cheyenne Coal Co.***, 21 BLR 1-111 (1999).

Where a district director has denied modification of a duplicate claim (in a case which has not progressed beyond the district director level), the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant has established a basis for modification of the district director's denial of his duplicate claim. An administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. ***Hess v. Director, OWCP***, 21 BLR 1-141 (1998).

The Board, sitting *en banc*, held that the Supreme Court's decision in ***Metropolitan Stevedore Co. v. Rambo [Rambo II]***, 521 U.S. 121 (1997), did not alter the one-element standard adopted by the Third Circuit in ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), or in other circuits. ***See Lisa Lee Mines v. Director, OWCP* [Rutter]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Board also held that the one-element standard adopted by the Third Circuit, in ***Swarrow***, and by the other circuits did not create, in violation of ***Director, OWCP v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g* ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and Section 7(c) of the Administrative Procedure Act, a presumption by which a claimant may prove a material change in conditions; rather, the courts held that a claimant may meet his burden of establishing a material change in conditions by establishing one of the elements of entitlement previously adjudicated against him. ***Troup v. Reading Anthracite Coal Co.***, 21 BLR 1-211 (1999).

The Board held that, inasmuch as the Third Circuit's adoption of the Director's rational interpretation of a material change in conditions in ***Swarrow*** does not significantly alter

the type of evidence that is necessary to meet a party's burden of proof, ***Swarrow*** does not compel the reopening of the record on remand in order to satisfy due process and fundamental fairness. The Board rejected employer's assertion that ***Swarrow*** mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence. Further, the Board rejected employer's assertion that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in ***Swarrow*** has affected its litigation strategy and its ability to present evidence on this issue such that the administrative law judge's refusal to reopen the record on remand constitutes a manifest injustice, holding that ***Swarrow*** neither creates a new factual element which must be addressed in order to establish or defend against a finding of a material change in conditions, nor affects the type of evidence relevant to a material change in conditions inquiry. Moreover, inasmuch as the burden of proof with respect to establishing a material change in conditions in the Third Circuit continues to be on claimant, and not on employer, the Board rejected employer's assertion that since ***Swarrow*** shifts the burden of proof in violation of the Administrative Procedure Act the Third Circuit's decision in ***Swarrow*** is not in accordance with the holding articulated by the Supreme Court in ***Ondecko***. The Board, therefore, concluded that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. ***Troup v. Reading Anthracite Coal Co.***, 21 BLR 1-211 (1999).

In cases arising in circuits in which the United States Courts of Appeals have not yet addressed the standard applicable to a duplicate claim pursuant to 20 C.F.R. §725.309, the Board overruled its previous holding in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), and adopted the Director's position in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. ***Allen v. Mead Corp.***, 22 BLR 1-61 (2000).

The Board held that in determining whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit in ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge must determine:

> 1) whether the newly submitted evidence demonstrates at least one of the elements of entitlement that was the basis of the prior denial, and,

> 2) if the administrative law judge determines that it does, the administrative law judge must then analyze whether the new evidence differs qualitatively from the evidence submitted with the previously denied claim, or was merely cumulative of, or similar to, the earlier evidence.

If the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the Court's requirement that claimant show there has been a "worsening" in his physical condition. ***Stewart v. Wampler Brothers Coal Co.***, 22 BLR 1-80 (2000).

The Board, sitting *en banc* on reconsideration, held that an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." The Board, therefore, held that such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 in accordance with ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). ***See also Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP* [*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). ***Caudill v. Arch Of Kentucky, Inc.***, 22 BLR 1-97 (2000).

The D.C. Circuit held that the revised regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 725.101(a)(6), 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309(d) and 725.701, promulgated by the Secretary of Labor in 2000, are applicable to all subsequent claims filed pursuant to 20 C.F.R. §725.309(d), as these claims are considered to be new claims. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 861, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: While the court also referenced Section 725.219(c), this is a typographical error, as no changes were made to Section 725.219(c) from the prior edition of the regulations.]

The Eleventh Circuit affirmed the administrative law judge's finding that because the claimant's earlier claims for survivor's benefits had been finally denied, her current duplicate claim must be denied pursuant to 20 C.F.R. §725.309(d)(1999). ***Coleman v. Director, OWCP***, 345 F.3d. 861, 23 BLR 2-1 (11th Cir. 2003).

The Sixth Circuit held that, pursuant to 20 C.F.R. §725.309 (1999), in order to grant a subsequent claim for benefits more than a year after an earlier claim has been denied, the administrative law judge must (i) determine, based upon all of the evidence accompanying the subsequent claim, that the miner has proven at least one of the elements of benefit entitlement previously adjudicated against him; (ii) find, based upon a comparison of the sum of the evidence considered in connection with the earlier claim

denial, that the new evidence is sufficiently more supportive to warrant a change in the outcome; and, finally (iii) determine on the merits, based upon the entirety of the record, that the miner is entitled to benefits. ***Grundy Mining Co. v. Flynn***, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

The Sixth Circuit held that the material change standard set out at 20 C.F.R. §725.309 (1999) does not demand that a claimant's new evidence point uniformly and unmistakably toward a more favorable outcome. It is sufficient that the evidence be sufficiently different to warrant a different outcome on one of the relevant elements of entitlement, so that there is no concern that two factfinders are making different assessments of essentially the same record. ***Grundy Mining Co. v. Flynn***, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

The Board affirmed the administrative law judge's application of the amended version of 20 C.F.R. §725.309, which took effect on January 19, 2001, in ***White***, as claimant's second application for benefits was filed on February 7, 2001. The Board affirmed the administrative law judge's finding that this subsequent claim failed because claimant did not establish that one of the applicable elements of entitlement had changed since the denial of the prior claim. *See* 20 C.F.R. §§725.202(d), 725.309(d). ***White v. New White Coal Co.***, 23 BLR 1-1 (2004).

The administrative law judge properly determined that claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment, and that claimant therefore had to submit new evidence with his subsequent claim establishing that he is totally disabled in order to demonstrate a change in "one of the applicable conditions of entitlement" as required by revised 20 C.F.R. §725.309(d). The responsible operator's contention that the administrative law judge misidentified the element of entitlement that was previously decided against claimant lacked merit, as the administrative law judge reasonably interpreted the district director's denial letter as including a finding that claimant did not establish total disability in the prior claim. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1- , BRB Nos. 03-0615 BLA, 03-0615 BLA-A (*Jun*. 28, 2004)(*en banc*).

The Board rejected employer's contention that the administrative law judge's reliance on more recent medical evidence in a duplicate claim to find legal pneumoconiosis and disability causation established creates, in effect, an irrebuttable presumption of latency and progressivity which does not *comport* with ***Nat'l Mining Ass'n v. U.S. Dep't of Labor***, 292 F.3d 849 (D.C. Cir. 2002) (*NMA*). The regulations and *NMA* do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. Thus, where the administrative law judge engages in a proper evidentiary analysis, he may, in his discretion, rely on the more recent medical evidence. ***Parsons v. Wolf Creek Collieries***, BRB No. 02-0188 BLA, BLR (Sep. 30, 2004)(Motion for Recon.)(*en banc*) (McGranery, J., concurring

and dissenting).

The Board affirmed the administrative law judge's denial of a duplicate survivor's claim pursuant to Section 725.309 as claimant failed to demonstrate that one of the applicable conditions of entitlement at Section 725.212, including at least one condition unrelated to the miner's physical condition at the time of his death, had changed. ***Boden v. G.M. & W. Coal Co., Inc.***, BLR , BRB No. 04-0286 BLA (Oct. 22, 2004).

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